

**EXHIBIT 1
part 2 of 5**

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10 SUPERIOR COURT OF CALIFORNIA
 11 COUNTY OF MONTEREY
 12 SALINAS DIVISION

13
 14 In re NO. HC 04990
 15 FRED L. BAKER,
 16 Petitioner,
 17 On Habeas Corpus.

RETURN TO THE ORDER TO
 SHOW CAUSE; SUPPORTING
 MEMORANDUM OF POINTS AND
 AUTHORITIES

INTRODUCTION

19 Petitioner Fred Baker (C-22918) is a state inmate who alleges that the Board of Parole
 20 Hearings ("Board") violated his due process rights when the panel ordered that his seventh
 21 subsequent parole consideration hearing, held on September 24, 2004, be reheard because the
 22 hearing could not be entirely transcribed. (Petn. at pp. 3-3(a).) Specifically, Baker challenges the
 23 Board's authority to have held a rehearing and concludes that because the Board's actions were
 24 inconsistent with the governing law and his incarceration has exceeded the relevant sentencing
 25 guidelines, he should be released. (Petn. at pp. 3-3(d), Prayer for Relief.) Despite recognizing
 26 the requirement that the entire hearing must be transcribed, the court ordered respondent to show
 27 cause "why any rescheduled hearing should not be heard by the same Board members with
 28 cause"

1 instructions to issue a Decision recommending parole." (Order, filed Aug. 23, 2005.) In a
 2 subsequent order, the court stated that "[g]iven the fact that the transcript contains approximately
 3 eighty pages of testimony, the Court remains interested in Respondent's position as to why a *de*
 4 *novo* hearing (one which appears to have reached a different conclusion) was necessary to correct
 5 Respondent's failure to properly record the September 24, 2004 hearing." (Order, filed Oct. 24,
 6 2005.)

7 Baker's due process rights were not violated when the Board ordered that his hearing be
 8 reheard because the law requires that the entire hearing be recorded and transcribed. Further,
 9 because Baker did not raise the issue in his petition, the court improperly directed respondent to
 10 justify holding a rehearing rather than having the panel re-create its decision, and the court
 11 cannot grant any relief on this basis. Accordingly, the petition should be denied.

12 **RETURN**

13 Respondent, A. Kane, Acting Warden at the Correctional Training Facility, for a return to
 14 the order to show cause, states:

15 1. Petitioner Fred L. Baker (C-22918) is lawfully in the custody of the Department of
 16 Corrections and Rehabilitation under a valid judgment of conviction for multiple offenses,
 17 resulting in a possible life sentence. (Ex. 1.) Baker does not contest the validity of his
 18 conviction in this petition. (See Petn. at pp. 3-3(a).) Rather, Baker contends that the Board
 19 violated his due process rights when it ordered that his seventh subsequent parole consideration
 20 hearing, held on September 24, 2004, be reheard because the entire hearing could not be
 21 transcribed. (*Ibid.*)

22 2. At his subsequent parole consideration hearing held on September 24, 2004,
 23 petitioner was present and represented by counsel. (Ex. 2 at pp. 1-2.) The victim and a
 24 representative from the district attorney's office were also present. (*Id.* at p. 2.) Commissioner
 25 Susan Fisher and Deputy Commissioner Rolando Mejia conducted the hearing. (*Id.* at p. 2.)
 26 Commissioner Fisher summarized the commitment offenses (*id.* at pp. 9-15), and Baker
 27 conceded that the summary was accurate (*id.* at p. 15) and provided additional details.

28 3. Baker, his female cousin (Bernice Habbit), his male juvenile cousin (Canado), and

1 another male juvenile (Ferris) went on a crime spree. (Ex. 2 at p. 25.) On the night of the
 2 offenses, Canado and Ferris went to Baker's grandmother's house where Baker was, and then
 3 they all went to his uncle's house where Habbit was. (*Id.* at pp. 57-58.) At his uncle's house,
 4 Baker smoked marijuana laced with PCP. (*Id.* at pp. 16-18.) Baker and Canado decided, in
 5 order to get Habbit some milk for her baby, that they would steal a car armed with guns that they
 6 took from his uncle's house. (*Id.* at p. 26.) Baker decided he would dress up as a woman and
 7 stand with Habbit on the side of the road, making it easier for someone to pull over. (*Id.* at pp.
 8 26-27.)

9 4. Accordingly, their first crime began when Habbit and Baker pretended to be
 10 hitchhiking, and a man stopped to offer the two "females" a ride. (*Id.* at p. 10.) Thereafter,
 11 either Ferris or Canado pulled a gun on the driver. (*Ibid.*) The driver was then pulled from his
 12 station wagon; his wallet was stolen, and he ran for his life as either Ferris or Canado fired a shot
 13 at him. (*Id.* at pp. 11, 66-67.) After the driver ran off, Baker first took possession of a gun when
 14 Canado handed it to him from the back seat. (*Id.* at pp. 67-68.) The suspects drove away in the
 15 victim's station wagon and continued their criminal activities by next committing a robbery and
 16 kidnaping. (*Ibid.*)

17 5. Habbit entered a 7-Eleven store and put items on the counter to purchase, but then
 18 said she had to go to the car to get her money. (Ex. 2 at p. 11.) Shortly thereafter, the three
 19 males entered the store wearing stocking masks and carrying rifles. (*Id.* at pp. 11-12.) Baker and
 20 Canado were each pointing a gun at the cashier, Ms. Ingram, and about \$140 was taken from the
 21 register. (*Id.* at p. 12.) They then put another 7-Eleven employee, Ms. Rommel, in the back of
 22 the station wagon and ordered Ms. Ingram to provide Ms. Rommel's car keys so the suspects
 23 could take Ms. Rommel's Pinto. (*Ibid.*) Baker and Canado put Ms. Ingram into the Pinto and
 24 the station wagon followed. (*Ibid.*) At an orange grove, the suspects ordered Ms. Ingram and
 25 Ms. Rommel out of the cars and told them to run and get out of sight or they would kill them.
 26 (*Ibid.*) Canado fired a shot over the victims' heads. (*Id.* at p. 74.) The suspects drove away and
 27 later pushed the Pinto into the bushes. (*Id.* at p. 13.) The suspects finalized their crime spree by
 28 shooting and paralyzing a man.

1 6. Their third crime involved Val Dixon, whose car had broken down. (Ex. 2 at p.
 2 13.) Mr. Dixon had called a tow truck and was returning to his car when the suspects pulled up
 3 in the station wagon, and Habbit asked Mr. Dixon if he needed a ride. (*Ibid.*) Mr. Dixon
 4 declined, the suspects drove off, but then made a u-turn. (*Ibid.*) When the car approached, Baker
 5 was holding a rifle and pointing it at Mr. Dixon, and Baker said "hey sucker." (*Id.* at p. 75.) Mr.
 6 Dixon was shot as he attempted to push the gun barrel away from his body. (*Id.* at p. 13.) The
 7 suspects drove away. (*Ibid.*) The doctors treating Mr. Dixon discovered that he had been shot
 8 twice. (*Id.* at pp. 13-14.) Mr. Dixon is paralyzed from the waist down. (*Id.* at p. 14.)

9 7. When the police stopped the suspects in the station wagon, Habbit exited the
 10 driver's door; Ferris exited and threw away live ammunition; Canado exited; and Baker was
 11 found hiding under the vehicle. (Ex. 2 at p. 14.) Two high-powered rifles were found in the
 12 back seat and one was found in the front passenger seat. (*Ibid.*) The suspects stated that Canado
 13 and Baker both had their guns pointed out the window, and both suspects fired when Mr. Dixon
 14 grabbed the guns. (*Ibid.*)

15 8. In reading the appellate opinion from Baker's criminal conviction, the deputy
 16 district attorney identified multiple inconsistencies with Baker's story. First, regarding how the
 17 guns were acquired, the deputy district attorney noted that a hardware store had recently been
 18 burglarized and guns and ammunition were taken. (Ex. 2 at p. 54.) In addition, laboratory tests
 19 of gunshot residue indicated that Baker was the one who shot Dixon, and ballistics tests indicated
 20 that the bullet had been fired from one of the guns taken at a hardware store burglary. (*Ibid.*)
 21 Further, the station wagon contained rifles taken from the hardware store and used during the
 22 crime spree. (*Id.* at p. 56.) Yet, at the hearing, Baker insisted that Canado got the guns from the
 23 back of the house (*id.* at p. 60) and that there were guns at the house because his uncle was in law
 24 enforcement and went hunting (*id.* at p. 26).

25 9. At the hearing, Baker contradicted himself multiple times regarding the guns. He
 26 initially said that they decided to bring the guns along when they decided to steal a car. (Ex. 2 at
 27 p. 26.) Then later, Baker said that they did not talk about bringing the guns; rather, one of the
 28 other guys just went and got the guns and brought them along. (*Id.* at p. 83.) In addition, Baker

1 contradicted himself when he explained when he first saw the guns. Baker initially said that
 2 Canado got the guns from the back of the house and that he saw the guns just before they smoked
 3 the PCP. (*Id.* at p. 60.) Later, Baker said he saw the guns for the first time when they were
 4 leaving the house to walk to where they would pretend to hitchhike and then carjack someone.
 5 (*Id.* at p. 64.)

6 10. Baker's testimony regarding the shooting of Mr. Dixon was faulty. Baker stated
 7 that his finger was on the trigger when Mr. Dixon slapped the gun and therefore his finger pulled
 8 the trigger. (*Id.* at p. 21.) Despite contrary evidence, Baker denied that he shot Mr. Dixon twice.
 9 (*Id.* at pp. 75-77.) When asked to explain how Mr. Dixon got shot twice, Baker speculated that
 10 one of the other suspects also had his gun pointing out the window, so when he heard Baker
 11 shoot Mr. Dixon, the other suspect also shot his gun. (*Id.* at p. 49.) Mr. Dixon said he only saw
 12 one gun pointed at him. (*Id.* at p. 75.)

13 11. Baker's explanation for his behavior is trivial compared to the harm he inflicted
 14 that night. The week before the offenses, Baker allegedly went into a rage when he learned that
 15 his girlfriend had aborted their child. (*Id.* at p. 16.) Further, these crimes were not an anomalous
 16 incident to be blamed on the PCP. Rather, the crimes were further evidence of Baker's
 17 escalating attitude problem. Within the two years prior, Baker had burglarized a store and
 18 escaped the juvenile facility he was sent to, resulting in Baker being sentenced to the California
 19 Youth Authority. (Ex. 2 at pp. 19-21.)

20 12. As the deputy district attorney was asking clarifying questions of Baker during the
 21 hearing, the tape needed to be changed. (Ex. 2 at pp. 83-84.) The rest of the hearing was unable
 22 to be transcribed. (*Id.* at p. 84; Ex. 3.) At a minimum, what was not transcribed includes the
 23 victim's statement (ex. 6 at p. 28, lines 18-19 [referring to his testimony "last time"]), and the
 24 panel's decision (Pen. Code, § 3042, subd. (c) [requiring the hearing officer to state her findings
 25 and supporting reasons on the record]). According to the written documents prepared at the
 26 hearing, the panel granted Baker parole and set his total term at 248 months, not including credit
 27 earned. (Ex. 5.) The panel conspicuously notified Baker on multiple documents that its decision
 28 was a proposed decision, it was not final, and it would be reviewed. (*Ibid.*)

1 13. During its mandatory review, Daniel Moeller of the Decision Review Unit
 2 recommended that because the transcript was incomplete, the Board should disapprove the
 3 September 24, 2004 decision granting parole and schedule a rehearing. (Ex. 3; Moeller Decl. at
 4 p. 1.) Terry Farmer, the then-chief counsel of the Board of Prison Terms, endorsed the
 5 recommendation. (*Ibid.*) The Board sitting en banc considered the findings and recommendation
 6 of the Decision Review Unit, and voted to disapprove the September 24, 2004 proposed decision
 7 and schedule a rehearing. (Ex. 4.)

8 14. A panel consisting of the same members who granted Baker parole on September
 9 24, 2004, conducted the rehearing and reached a conclusion opposite to their original decision.
 10 (Ex. 6 at p. 31.) Baker was denied parole for one year. (*Ibid.*)

11 15. Baker does not establish any grounds for habeas corpus relief.

12 16. A parole consideration decision is not in accordance with the law unless a
 13 complete hearing transcript is made. The victim (Pen. Code, § 3043, subd. (b)), the district
 14 attorney (*id.*, § 3042, subd. (a)), and the defendant (*id.*, § 3041.5, subd. (a)(2)) must have an
 15 opportunity to voice their opinions. Further, the transcript must be available to the public (*id.*, §
 16 3042, subd. (b)), and it must include the findings and reasons supporting the decision (*id.*, §
 17 3042, subd. (c)). Finally, the Board (*id.*, § 3041, subd. (b)) and the Governor (*id.*, § 3041.1) must
 18 be able to competently review the panel's decision.

19 17. The Board did not rescind the panel's finding that Baker was suitable for parole,
 20 (Cal. Code Regs., tit. 15, §§ 2450 et seq.) Rather, the Board reviewed the panel's decision
 21 pursuant to sections 2041 et seq. of title 15 of the California Code of Regulations, and properly
 22 ordered that the decision be disapproved and a rehearing be scheduled. (Cal. Code of Regs., tit.
 23 15, § 2042 [including that an error of law is a basis for disapproving a decision]; Pen. Code, §
 24 3041, subd. (b) [providing that the decision of a parole panel will not become final if upon
 25 review the Board finds that the panel made an error of law].)

26 18. Holding another hearing because Baker's original hearing was unable to be
 27 transcribed did not violate Baker's due process rights because he does not have a due process
 28 interest in a proposed decision that was not in accordance with the law.

1 19. Because Baker did not raise the issue in his petition, the court improperly directed
 2 respondent to justify holding a rehearing rather than having the panel re-create its decision, and
 3 the court cannot grant any relief on this basis.

4 20. Except as expressly admitted, respondent denies every allegation of this petition,
 5 including that Baker's administrative, statutory, or constitutional rights were violated when the
 6 Board ordered that Baker's September 24, 2004 parole consideration hearing be reheard.

7 21. Respondent denies that discovery or an evidentiary hearing is necessary in this
 8 case.

9 22. Respondent denies that Baker should be released on parole, on his own
 10 recognition, or on bail.

11 23. This return is based on the allegations made in the accompanying memorandum of
 12 points and authorities and exhibits, which are incorporated by reference.

13 WHEREFORE, the petition for writ of habeas corpus should be denied, and the order to
 14 show cause should be discharged.

15
 16 Dated: November 23, 2005

Respectfully submitted,

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 Senior Assistant Attorney General

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MEMORANDUM OF POINTS AND AUTHORITIES

1 I. The Petition Should Be Denied Because the Paramount Concern
 2 for Public Safety Would Be Compromised if the Board Was Required
 3 to Rely on an Untimely, Re-Created Transcript of the Hearing.

4 The Board properly disapproved the September 24, 2004 decision granting Baker parole
 5 and requested a rehearing because the hearing transcript was incomplete. Not ordering a
 6 rehearing would be contrary to law and public policy. When determining a prisoner's suitability
 7 for parole, the overriding concern is for public safety. (*In re Dannenberg* (2005) 34 Cal.4th
 8 1061, 1084.) “[B]oth the Legislature and the voters have . . . indicated, in multiple ways, their
 9 abiding concern that the Board not schedule the release of *any* life-maximum prisoner who is still
 10 dangerous.” (*Id.* at p. 1088.) The panel must consider the statements and recommendations of
 11 the victim, the judge, the district attorney, the prisoner’s trial attorney, the investigating law
 12 enforcement agency, and information from the public, and the panel must acknowledge in its
 13 decision that it has done so. (*Id.* at pp. 1084-1085.) The California Supreme Court recognized
 14 the import of this information being part of the hearing record by finding that public input could
 15 be decisive in a parole suitability determination. (*Id.* at p. 1085.)

16 Because determining one’s suitability is such a consequential decision, the decision is not
 17 final until it has been subject to multiple levels of review. First, the decision is reviewed and the
 18 decision may be affirmed or modified without a new hearing, or a new hearing may be ordered.
 19 (Cal. Code of Regs., tit. 15, § 2041, subd. (h).) A new hearing is appropriate if there was an error
 20 of law or fact, or based on new information. (*Id.*, § 2042; Pen. Code, § 3041, subd. (b).) If the
 21 chief counsel recommends that a new hearing should be held, a new hearing will not be ordered
 22 unless a majority of the Board sitting en banc votes to do so. (Pen. Code, § 3041, subd. (b); Cal.
 23 Code Regs., tit. 15, § 2041, subd. (h).) Regardless of the Board’s decision on review, the
 24 Governor has the right to review the decision and request an en banc hearing by the Board. (Pen.
 25 Code, § 3041.1.) In that case, the en banc Board cannot grant parole unless a majority of the
 26 Board members votes to do so. (*Ibid.*)

27 Here, the Board’s actions of ordering a rehearing were legally mandated. The hearing
 28 transcript omitted any further questions by the deputy district attorney, the panel, or Baker’s

1 counsel. (See generally Ex. 2.) In addition, the transcript lacked the victim's statement (ex. 6 at
 2 p. 28, lines 18-19 [referring to his testimony "last time"]), and the panel's findings and reasoning
 3 for granting Baker parole (Pen. Code, § 3042, subd. (c) [requiring the hearing officer to state her
 4 findings and supporting reasons on the record]). Moreover, as is the usual practice, Baker and/or
 5 his attorney, as well as the deputy district attorney, likely gave a closing statement that was not
 6 included in the transcript. (See Ex. 2, p. ii [reflecting that no closing statements were
 7 transcribed]; Ex. 7 at pp. 15-22 [reflecting the deputy district attorney's closing statement]; Ex. 7
 8 at pp. 22-27 [reflecting Baker's attorney's closing statement].) The Board could not effectively
 9 fulfill the statutory requirement that the hearing transcripts be made available to the public and be
 10 subject to different levels of executive review with such an incomplete transcript.

11 In addition, relying on the partial transcript or re-creating it based on the panel's
 12 recollection is not consistent with public policy. Such reliance is perverse considering that the
 13 paramount concern when determining whether someone is suitable for parole is ensuring public
 14 safety. Requiring the reviewers of the hearing to rely on the panel's re-created version of a
 15 significant part of the hearing, including its decision and reasoning, would be antithetical to
 16 ensuring that the soundness of the panel's decision to release a man who continuously gave
 17 inconsistent explanations regarding the guns that tormented his carjacking, robbery, and
 18 kidnaping victims and finally paralyzed Mr. Dixon.

19 Further, Baker was not served an injustice. He was aware that the panel's decision
 20 finding him suitable for parole was not a final decision and was subject to review. (Ex. 5.)
 21 Therefore, he did not have any expectation of being released. (*In re Powell* (1988) 45 Cal.3d
 22 894, 903 [noting that a prisoner "has no vested right in his prospective liberty on a parole release
 23 date"].)

24 In addition, the equitable relief contemplated by the court would be futile. Having the
 25 panel members re-create the decision granting parole based on the existing transcript and their
 26 recollection would still not cure the fact that the entire transcript was not recorded as required by
 27 law.

28 In summary, yes, Baker is not responsible for the hearing being transcribed in part only.

1 But Baker was not deprived of any due process because there is no regulation or statute
 2 mandating his release if the panel finds Baker suitable for parole, but the entire hearing,
 3 including the panel's reasoning supporting its tentative decision, is not transcribed. Rather, the
 4 process complied with the law. The tentative decision granting parole was reviewed, a rehearing
 5 was had, and upon further review, the same panel concluded that public safety concerns required
 6 finding Baker unsuitable for parole. (Cal. Code Regs., tit. 15, § 2281, subd. (a) [“a life prisoner
 7 shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will
 8 pose an unreasonable risk of danger to society if released from prison”]; accord Pen. Code, §
 9 3041, subd. (b).) Accordingly, the petition should be denied and the order to show cause should
 10 be discharged.

11 **II. The Petition Should Be Denied Because the Court Improperly
 12 Directed Respondent to Address a Claim that Baker Did Not
 Raise in His Petition.**

13 In its order to show cause and subsequent order of October 24, 2005, the court directed
 14 respondent to address the issue of why a de novo hearing was necessary, rather than just having
 15 the panel re-create its decision from memory. The court cannot grant relief on this issue because
 16 Baker did not raise the issue in his petition. It is well-established that a court order directing
 17 respondent to address issues not raised in the petition is improper. (*Board of Prison Terms v.
 18 Superior Court* (2005) 130 Cal.App.4th 1212, 1237.) In a habeas proceeding, “the petitioner
 19 bears a heavy burden initially to *plead* sufficient grounds for relief.” (*People v. Duvall* (1995) 9
 20 Cal.4th 464, 474, emphasis in original.) To meet this heavy burden, the petitioner should state
 21 the facts fully and particularly; conclusory allegations without support are insufficient. (*Ibid.*)

22 Only when the petitioner’s initial burden of pleading is met may the court issue an order
 23 to show cause. (*People v. Duvall, supra*, 9 Cal.4th 464 at pp. 474-475.) “When an order to show
 24 cause does issue, it is limited to the claims raised in the petition and the factual bases for those
 25 claims alleged in the petition.” (*Id.* at p. 475, [quoting *In re Clark* (1993) 5 Cal.4th 750, 781, fn.
 26 16].) “The [habeas] case is heard and determined on the issues framed by the pleadings.” (*Ex
 27 parte Connor* (1940) 16 Cal.2d 701, 711.) Respondent should be directed to address only those
 28 issues. (*Duvall*, at p. 475; *Board of Prison Terms v. Superior Court, supra*, 130 Cal.App.4th at

1 p. 1237.) Therefore, a superior court's discretion in reviewing habeas petitions does not include
2 adding a claim that the petitioner did not raise in his petition. (See *Board of Prison Terms v.*
3 *Superior Court, supra*, 130 Cal.App.4th at pp. 1235-1237.)

4 The court's concern with why the Board ordered a rehearing rather than allowing the
5 panel to re-create its decision from memory is an issue addressing the proper relief and was not
6 raised by Baker in his petition. In his petition, Baker challenges the Board's authority to have
7 held a rehearing and concludes that because the Board's actions were inconsistent with the
8 governing law and his incarceration has exceeded the relevant sentencing guidelines, he should
9 be released. (Petn. at pp. 3-3(d), Prayer for Relief.) Baker does not contend that the Board
10 should have proceeded in one manner or another, just that ordering the rehearing was
11 inconsistent with the governing law. Moreover, Baker does not contend that a re-created hearing
12 is the appropriate relief. Rather, he contends that he should be released. Thus, because Baker
13 did not raise the issue in his petition, the court improperly directed respondent to justify holding a
14 rehearing rather than having the panel re-create its decision, and the court cannot grant any relief
15 on this basis.

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CONCLUSION

2 Baker was not deprived of any due process when the Board properly ordered that his
3 parole consideration hearing be reheard in accordance with the law. In addition, the court
4 improperly directed respondent to address an issue that Baker did not raise in his petition.
5 Accordingly, the court should deny the petition and discharge the order to show cause.

7 Dated: November 23, 2005

Respectfully submitted,

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18 SUPERIOR COURT OF CALIFORNIA
19
20 COUNTY OF MONTEREY
21
22 SALINAS DIVISION

23
24 In re

25 FRED L. BAKER,

26 Petitioner,

27 On Habeas Corpus.

28 NO. HC 04990

29 DECLARATION OF DANIEL
30 MOELLER IN SUPPORT OF THE
31 RETURN TO THE ORDER TO
32 SHOW CAUSE

33
34 I, DANIEL MOELLER, declare as follows:

35 1. I am employed by the California Department of Corrections and Rehabilitation.
36 Since May 2005, I have been a deputy commissioner for the Board of Parole Hearings. For
37 approximately five years before that, I was a staff counsel for the Board of Prison Terms where
38 my duties included reviewing the proposed decisions of parole consideration hearings for any
39 errors of law or fact.

40 2. I am familiar with the Decision Review Unit's recommendation regarding the
41 seventh subsequent parole consideration hearing on September 24, 2004, for inmate Fred Baker
42 (C-22918). I signed the recommendation on behalf of the Decision Review Unit, and the then-
43 chief counsel of the Board of Prison Terms, Terry Farmer, endorsed the recommendation.

1 3. I am also familiar with the statutes and regulations governing parole consideration
2 decisions and the Board's mandatory review of them. When as in Baker's case, a significant
3 portion of the transcript is unable to be transcribed, the hearing is not in accordance with the law.
4 The victim (Pen. Code, § 3043, subd. (b)), the district attorney (*id.*, § 3042, subd. (a)), and the
5 defendant (*id.*, § 3041.5, subd. (a)(2)) must have an opportunity to voice their opinions. The law
6 requires that the transcript must be available to the public (Penal Code, § 3042, subd. (b)), and it
7 must include the findings and reasons supporting the decision (*id.*, § 3042, subd. (c)). In
8 addition, the Board (*id.*, § 3041, subd. (b)) and the Governor (*id.*, § 3041.1) must be able to
9 competently review the panel's decision

10 4. In order to comply with the law, the appropriate remedy for such an incomplete
11 transcript was to order the decision be disapproved and a rehearing be scheduled. (Cal. Code of
12 Regs., tit. 15, § 2042 [including that an error of law is a basis for disapproving a decision]; Pen.
13 Code, § 3041, subd. (b) [providing that the decision of a parole panel will not become final if
14 upon review the Board finds that the panel made an error of law].)

15 I declare under penalty of perjury that the foregoing is true and correct and that this
16 declaration was executed on November 23, 2005.

DANIEL MOELLER
Deputy Commissioner, Board of Parole Hearings

Exh. L.

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

FILED

DEC 23 2008

In re) HC 04990
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 FRED L. BAKER)
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 On Habeas Corpus)

LISA M. GALDOS
CLERK OF THE SUPERIOR COURT
L MORRIS DEPUTY

TRAVERSE/RESPONSE TO RETURN TO
ORDER TO SHOW CAUSE; MEMORANDUM
AND POINTS AND AUTHORITIES
IN SUPPORT OF RELIEF

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7 SUPERIOR COURT OF CALIFORNIA
8 COUNTY OF MONTEREY
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11 In Re) HC 04990
12 FRED L. BAKER,)
13 On Habeas Corpus.) TRAVERSE/RESPONSE TO
14) RESPONDENT'S RETURN TO ORDER
15) TO SHOW CAUSE; MEMORANDUM OF
16) POINTS AND AUTHORITIES IN
17) SUPPORT OF RELIEF

18 INTRODUCTION

19 On August 23, 2005 this Court ordered Respondents to show
20 cause why Petitioner should not be granted the relief sought in
21 his petition. Specifically, Respondents were ordered to show
22 cause why any rescheduled parole hearing should not be heard by
23 the same Board members who heard the September 24, 2004 hearing,
24 with instructions to issue a decision recommending parole.

25 Petitioner was provided appointed counsel through the Alternate
26 Defender's Office of Monterey County, with above named attorney
27 receiving a copy of the O.S.C. on or around September 1, 2005.

28 Respondents had been granted an extension of time to file
their Return, which under the original Order to Show Cause issued

1 in this matter was due on September 27, 2005. Respondents
2 informed the Court in the Request for an Extension, that a
3 hearing had been rescheduled for Oct. 4, 2005 in front of the
4 same commissioners: Respondents took advantage of this Court
5 granting the extension requested by conducting a *de novo* hearing,
6 which predictably resulted in a recommendation against parole.
7 In so doing, it appears Respondents were attempting to avoid
8 justifying why Petitioner was not entitled to the relief sought.

9 On November 23, 2005, Respondent's filed their Return. This
10 Return attempts to address both the original Order to Show Cause,
11 and a subsequent order issued by this Court in response to a
12 letter from Respondents, dated October 5, 2005, in which it was
13 indicated that no response to the Request for an Extension to
14 File had been received and also requesting "that the Court advise
15 the parties if it is going to modify the Order to Show Cause,
16 namely, whether Respondent should still address why inmate
17 Baker's should not be heard by the same Board members with
18 instructions to issue a decision recommending parole."
19 Essentially this request to "modify" the O.S.C. was Respondent
20 asking the Court if they are still required to show cause why
21 Petitioner was not entitled to relief, because they had taken
22 steps not to provide the requested remedy but rather designed to
23 avoid having to answer to the Court. Further, despite
24 Respondents asking the Court to issue an order based on their
25 request, respondent suggest in their Return that the Court had no
26 authority to question why they proceeded in a manner wholly
27 inconsistent with the Court's original order. (Please see the
28 transcript from the Oct. 4, 2005, hearing, attached to the Return

1 as Exhibit 6, in which it is stated that the proceeding is a
2 "rehearing" pursuant to a court order [pg.1, lines 20-27 and
3 pg.2, lines 1-22], yet they clearly do not proceed in accordance
4 with that order as they conducted a *de novo* hearing, including
5 admittedly different testimony from the victim [starting at pg.
6 28, line 12] and new argument from the D.A. [starting at pg.
7 15]).

8 Petitioner was given until December 16, 2005 to file a
9 Traverse in this matter. A one week Extension of time to file
10 was requested and granted, making the Travers due by December 23,
11 2005.

12 This Traverse/Response is submitted to present additional
13 facts in support of the claims on which the Order to Show Cause
14 was issued. It hereby incorporates by reference the Petition for
15 Writ of Habeas Corpus, exhibits attached thereto, and the other
16 pleadings filed in this matter, and the attached Memorandum of
17 Points and Authorities, in support of its motion that this Court
18 grant the relief requested.

19

20 DENIALS AND EXCEPTIONS

21 1. Petitioner contest and takes exception to the Return, in
22 that paragraphs 8 through 11 fail to affirmatively state facts
23 that contradict the factual allegations in the Petition for Writ
24 of Habeas Corpus. Specifically, the above cited paragraphs deal
25 with matters not addressed in the Petition, making them non-
26 responsive, and thereby irrelevant, as responses to the factual
27 allegations in the Petition.

28 2. Petitioner denies and takes exception to the portion of

1 paragraph one that alleges his custody is lawful and proper.

2 3. Petitioner admits that paragraphs 2 through 7 are
3 factually accurate based on the record.

4 4. Respondent takes exception to paragraph 12 of the Return
5 in that it alleges the September 24, 2004 hearing was unable to
6 be transcribed. Nowhere in the transcriber's declaration does
7 she indicate any problem with transcribing the one tape provided
8 to her, nor is there anything within the declaration of Daniel
9 Moeller, indicating that he ever consulted with the transcriber
10 regarding either the presence of or the malfunctioning of a
11 second tape. (See Exhibit 2 of Return, pg. 84, lines 3-4 and
12 Exhibit 4 of the Return) The issue that must be addressed is in
13 regard to the apparently missing second tape, which was never
14 presented to the transcriber. (See Exhibit 2 of the Return, pg.
15 84 indicating "no further tapes were received for
16 transcription").

17 5. Petitioner admits that paragraph 13 of th Return is
18 true.

19 6. Petitioner admits the factual information in paragraph
20 14 of the Return, but takes exception to the any suggestion that
21 the Oct. 4, 2005 hearing, and the result reached therein, should
22 impact his request for relief based on the inequities that
23 occurred subsequent to the September 24, 2004 hearing.

24 7. Petitioner denies and takes exception to paragraph 15 of
25 the Return.

26 8. Petitioner denies and takes exception to paragraph 16 of
27 the Return, as it suggests that a parole hearing decision is not
28 in accordance with the law unless a complete transcript is made.

1 To the contrary, the decision made at the September 24, 2004
2 hearing was in accordance with the law. Petitioner was given the
3 opportunity to be heard, as were the victim and others, a written
4 statement setting forth the recommendation of parole was
5 generated, as were documents regarding the condition of release
6 and consequences for failure to meet those conditions.

7 9. Petitioner denies and takes exception to paragraph 17 of
8 the Return, in that it alleges that the Board properly ordered
9 that the September 24, 2004 decision be disapproved and a new
10 hearing be rescheduled. Such action is the basis of the petition
11 in this matter.

12 10. Petitioner denies and takes exception to paragraph 18
13 of the Return in that it alleges that ordering of rehearing was
14 not in violation of Petitioner's due process rights.
15 Respondents's cannot carry their burden of establishing a record
16 that would support their position.

17 11. Petitioner denies and takes exception to paragraph 19
18 of the Return, in that it states this Court is without the power
19 and authority to direct Respondent to justify the need for a de
20 novo hearing, rather than having the panel recreate their prior
21 decision from the transcript and their own recollection. Case
22 law provides that the Superior Court has the power to re-state
23 inartfully drafted claims for the purpose of clarity. Aside from
24 that, this Court clearly has authority to direct the Respondents
25 to justify their action in response to a request by Respondents
26 themselves asking that they not be required to do so.

27 12. Except as expressly admitted in this Traverse,
28 Petitioner denies and takes exception to each and every

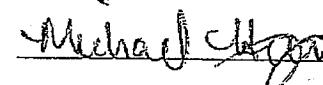
1 allegation contained in the Return.

2 THEREFORE, the Petition for Writ of Habeas corpus should be
3 granted, and the Respondents be ordered to release Petitioner
4 forthwith.

5

6 Dated: December 23, 2005

Respectfully Submitted,

8 
9 Michael Herro

10 Attorney for Petitioner

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1 MEMORANDUM OF POINTS AND AUTHORITIES
2 IN SUPPORT OF RELIEF

3 I

4 RESPONDENTS FAILED TO ADDRESS THE FACTUAL ALLEGATION
5 OF THE PETITION THAT FORMED THE BASIS OF PETITIONER'S
6 CLAIM AND MISSTATED THE FACTS AS SET FORTH THEREIN.

7 The error of law that the Respondents keep reiterating is
8 misstating the facts as stated in the factual allegations of the
9 habeas corpus. From the very beginning, Petitioner has held the
10 position that there was never a malfunctioning of the recording
11 equipment, but rather, a second tape that is missing. Respondents
12 had the burden of establishing the record. Thus, it is important
13 to note that it was Respondent, rather than Petitioner, who failed
14 to record the "Decision" portion of the hearing as required by
Penal Code § 3042.

15 Respondents had clearly mandated available remedies to avail
16 themselves of what they're now labeling as an error of law. See
17 (Penal Code § 3041(b) and Cal. Code of Regs., tit. 15, § 2254.) It is
18 through these remedies that Respondents were able to ascertain a
19 written summary of the evidence considered, the evidence relied on,
20 and the findings of the hearing panel with supporting reasons. There-
21 fore, making the record available to the public, and preserving the
22 Board and Governor their statutory right to review the parole
23 grant. Consequently, addressing the concerns of Penal Code § 3042,
24 subds. (b) & (c). Respondents failed to address this apparent
25 inequity in their Informal Response, and continue to do so in the
26 present Return.

27 The habeas procedure as stated in the Penal Code contemplates
28 the custodian of the confined person shall file a responsive

1 pleading called a return. Accordingly, the California Supreme
2 Court has required more of the return than mere compliance with the
3 literal language of section § 1480; the Court requires the return
4 to "allege with facts tending to establish the legality of
5 petitioner's detention." See In re Sixto, (1989) 48 Cal.3d 1247,
6 1252; "The return ... must allege facts establishing the legality
7 of the petitioner's custody." See People v. Romero, (1994) Cal.4th
8 728; "return must allege facts." See In re Lawler, (1979) 23
9 Cal.3d 190, 194. The Court further noted:

10 "The requirement that the return allege facts responsive to the
11 petition is critical, for the factual allegations in the return
12 are either admitted or disputed in the traverse and this
interplay frames the factual issues that the court must decide.
Facts set forth in the return that are not disputed in the
traverse are deemed true."

13
14 See People v. Duvall, (1995) 9 Cal.4th 464 (citing Lawler, supra,
15 23 Cal at p. 194).

16 In the present case, Respondents filed a return that did not
17 dispute the material facts alleged by Petitioner. Accordingly,
18 this Court must find that Respondent is deemed to admitted those
19 material factual allegations that they've failed to dispute. See
20 Sixto, supra, 48 Cal.3d at 1252.

21 ///
22 ///
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28 ///

II

PURSUANT TO PENAL CODE SECTION 3041(b) AND THE CALIFORNIA CODE OF REGULATIONS TITLE 15, DIVISION TWO, SECTION(S) 2041, 2042, 2044 AND 2451, THE BOARD OF PAROLE HEARINGS HAS LOST JURISDICTION TO PRESIDE OVER PETITIONER'S PAROLE APPLICATION

A. Governing Statute

Penal Code § 3041(b) provides in pertinent part:

"a decision of the parole panel finding an inmate suitable for parole shall become final within 120 days of the date of the hearing. During that period, the board may review the panel's decision. The panel's decision shall become final ... unless the board finds that the panel made an error of law, or that the panel's decision was based on an error of fact, or that new information should be presented to the board, any of which when corrected or considered by the board has a substantial likelihood of resulting in a substantially different decision upon a rehearing. In making this determination, the board shall consult with the commissioners who conducted the parole consideration hearing."

B. Governing Regulations 2/

Board regulations defining the time and manner in which suitability determinations are to be reviewed, disapproved or rescinded are set forth in four sections.

1) Mandatory Time-Limits

Section 2041, establishes that a reconsideration panel shall, within a maximum period of twenty days or a board review committee shall, within a maximum period of 60 days from the date of the hearing:

"(i) affirm the original proposed decision, (ii) order a new hearing, or (iii) modify the decision without a new hearing."

(subd. (d)1 & 2), and in the event of an en banc referral "the full board shall review within a maximum period of forty-five days from the date of the hearing any proposed decision referred by a member of the hearing panel who requested the full board to consider the case." 2044.

2. At the time Petitioner was found suitable for parole, the language cited by the Deputy Attorney General was not part of Cal. Code of Regs., tit. 15, §§ 2041, 2042. Thus, it's not applicable to the issues before the Court.

1 2) Specified Criteria.

2 Section 2042 provides the criteria for disapproval of a
 3 decision, which include:

4 "clerical errors, apparent inconsistency of result from results
 5 generally obtained for the same or similar cases, incorrect
 6 application of the law (statutes or regulations), a decision
 7 not supported by the findings, findings not supported by the
 8 evidence on the record, or a unique or unusual policy issue
 9 posed by the proposed decision",

10 and section 2451 identifies conduct upon which "good cause" for
 11 rescission must be premised; including:

12 "(1) any disciplinary conduct subsequent to the parole grant, (2)
 13 psychiatric deterioration of the prisoner, (3) fundamental errors
 14 occurred, resulting in the improvident granting of a parole date,
 15 and (4) new information indicating parole should not occur, such
 16 as an inability to meet a special condition of parole, information
 17 significant to the original grant of parole being fraudulently with-
 18 held from the board."

19 C. Standard of Review

20 This Court is "authorized to review the factual basis of
 21 a decision of the Board denying parole in order to ensure that the
 22 decision comports with the requirements of due process of law."

23 See In re Rosenkrantz, (2002) 29 Cal.4th 616, 677.

24 "[I]n conducting such a review, the court may require only whether
 25 some evidence in the record before the Board supports the decision
 26 to deny parole, based upon the factors specified by statute and
 27 regulations. If the decision's consideration of the specified
 28 factors is not supported by some evidence in the record and thus is
 devoid of factual basis, the court should grant the prisoner's
 petition for writ of habeas corpus and should order the Board to
 vacate its decision denying parole and thereafter to proceed in
 accordance with due process of law."

29 Id. at 658. "To impose a standard of review that is less stringent
 30 than the 'some evidence' test set forth in Powell [45 Cal.3d 894]
 31 would permit the Board to render a decision without any basis
 32 in fact. Such a decision would be arbitrary and capricious,
 33 thereby depriving the prisoner of due process of law." Id. at 657-58.

Judicial oversight must be extensive enough to protect the limited right of parole applicants "to be free from an arbitrary parole decision ... and to something more than mere pro forma consideration." See In re Sturm, (1974) 11 Cal.3d 258, 268.

In the context of parole, the requirements of due process are satisfied if "some evidence" supports the decision. See McQuillion v. Duncan, 306 F.3d 895, 904 (9th Cir. 2002). Moreover, in accordance with the United States Supreme Court's decision in Superintendent v. Hill, 475 U.S. 445, 86 L.Ed.2d 356, 105 S.Ct. 2768 (1985) and the Ninth Circuits decision in Jancsek v. Oregon Bd. of Parole, 883 F.2d 1389 (9th Cir. 1987), the California Supreme Court has indicated that there must be "some evidence" supporting parole rescission. See Powell, supra, 45 Cal.3d at 904.

In this Court, Respondents had placed their "some evidence" claim in a significantly different posture because none of the evidence supporting "good cause" was presented as in other courts (E.g., Caswell, McQuillion, Powell, Rosenkrantz). Additionally, in bold contrast to the California Supreme Court's recent opinion in In re Dannenberg, (2005) 34 Cal.4th 1061, Respondents overturned and ordered reheard the granting panel's finding of suitability simply by failing to locate and transcribe the "[missing] tape" (Ex. 2, p. 84:3-4) or take advantage of the alternative remedies.³ Because the time already served by Petitioner is in gross excess of the established guidelines for his commitment offense, his continued incarceration further advances the "excessive confinement" threshold that the Supreme Court has held to violate

3. By way of example, Petitioner request this Court to take Judicial Notice of In re FREDDY FIKE, (B-65105), as the proceeding plainly governs the situation in this case. See Appendix B; BPT-1000(a) Denial-Worksheet attached hereto. The decision worksheet applicable to the present case is attachment Appendix A.

1 the cruel and unusual punishment clause (art. I, § 17) of the
2 California Constitution. See In re Rodriguez, (1975) 14 Cal.3d
3 639, 646-656.

4 III
5

6 AFTER PETITIONER SUCCESSFULLY CONTROVERTED THE
7 FACTUAL INFORMATION SUBMITTED WITH RESPONDENTS'
8 INFORMAL RESPONSE, 'THE COURT PROPERLY DIRECTED
RESPONDENTS TO ADDRESS THE CLAIM RAISED IN THE
PETITION ON WHICH THE ORDER TO SHOW CAUSE WAS
ISSUED.
9

10 The goal of the procedures that govern habeas corpus is to
11 provide "a framework in which a court can discover the truth and do
12 justice in a timely fashion." See Board of Prison Terms v.
13 Superior Court, (2005) 31 Cal.Rptr.3d 70, 90 (citing People v.
14 Duvall, *supra*, 9 Cal.4th at 482.) Thus, when presented with a
15 petition for writ of habeas corpus, the court evaluates it by
16 asking "whether, assuming the petitioner's factual allegations are
17 true, the petitioner would be entitled to relief?" See Romero,
18 *supra*, 8 Cal.4th at 738.

19 If the court finds that the petition states a prima facie
20 case, "the Court is obligated by statute to issue a writ of habeas
21 corpus." See Romero, *supra*, 8 Cal.4th at 737; Duvall, *supra*,
22 9 Cal.4th at 474. In crafting the Order to Show Cause the Court
23 has the power to "explain its preliminary assessment of the
24 petitioner's claims, re-state inartfully drafted claims for the
25 purposes of clarity, and limit the issues to be addressed in the
26 return to only those issues for which a prima facie showing has
27 been made." See Board of Prison Terms v. Superior Court, *supra*,
28 31 Cal.Rptr.3d at 89-90. Once the Court has decided that habeas

1 relief is warranted, "it authorizes the court to fashion a remedy
2 for the deprivation of any fundamental right which is cognizable on
3 habeas corpus." See Board of Prison Terms v. Superior Court,
4 supra, 31 Cal.Rptr.3d at 87.

5 In fashioning a remedy for the apparent inequity Petitioner
6 suffered at the hands of Respondents, the Court noted that
7 Respondents' Informal Response failed to "discuss several important
8 issues, including: 1) when Petitioner's rescheduled hearing is set
9 to occur, 2) whether the same Board members will preside over the
10 rescheduled hearing and 3) whether the rescheduled hearing will
11 involve a de novo review of Petitioner's suitability for parole or
12 simply a review of the decision." OSC, page 1:20-25. The Court
13 then summarized that "the most equitable solution would be to
14 reschedule the hearing before the same Board members with
15 instructions to adopt the existing transcript from the former
16 hearing and recreate their Decision to recommend parole based on
17 that transcript and their independent recollection. Accordingly,
18 Respondent is Ordered to Show Cause why Petitioner should not be
19 granted the relief sought in his Petition. Specifically,
20 Respondent is Ordered to Show Cause why any rescheduled hearing
21 should not be heard by the same Board members with instructions
22 to issue a Decision recommending parole." OSC, page 2:3:13.

23 After Petitioner was found unsuitable for parole, by the same
24 Board members at the October 4, 2005, hearing, involving a de novo
25 review, the Court denied Respondents' request that the Court
26 modify its Order to Show Cause and indicated that "the Court
27 remains interested in Respondent's position as to why a de novo
28 hearing (one which appears to have reached a different conclusion)

1 was necessary to correct Respondent's failure to properly record
2 the September 24, 2004, hearing."

3 In its answer, Respondents note "relying on the partial
4 transcript or re-creating it based on the panel's recollection is
5 inconsistent with public policy. Such a reliance is perverse
6 considering that the paramount concern when determining whether
7 someone is suitable for parole is ensuring public safety."

8 Objections, page 9:11-14. Respondents neglect to mention in their
9 objections that the Board has prescribed a rule that governs the
10 Court's equitable solution, in which Respondents rely on the
11 partial transcript and adopts the panel's decision and reasoning
12 for the decision from an alternative source. See Appendix B.

13 Further, Respondents offers no evidence to show that Petitioner
14 has become an unreasonable risk of danger or risk to public safety
15 since his finding of suitability. See Caswell, supra, 92 Cal.App.
16 4th at 1027 (holding that "a rescission may not be upheld merely
17 because the Board has mouth words that have been held to
18 constitute 'cause' for rescission. There must be a factual under-
19 pinning for the Board's determination cause.")

20 Finally, Respondents conclude that "the court's concern with why the Board
21 ordered a rehearing rather than allowing the panel to re-create its
22 decision from memory is an issue addressing the proper relief
23 and ... because [Petitioner] did not raise the issue in his
24 petition, the court improperly directed respondent to justify
25 holding a rehearing rather than having the panel re-create its
26 decision, and the court cannot grant any relief on this basis."

27 Objections, page 11:4-15.

28 Respondents err. The fundamental nature of the Due Process

1 claim is based on the fact that the Board of Parole Hearings
2 rescinded its September 24, 2004, finding that Petitioner was
3 suitable for parole based solely on the fact that the Board lost
4 the decision portion of the transcript from the hearing has not
5 changed.

6 Certainly new details arose during the discovery portion of
7 this matter. For example, we learned that the rescheduled hearing
8 was set to be held on October 4, 2005, in front of the same
9 commissioner and deputy commissioner who conducted the September
10 24, 2004 suitability hearing. But none of the new facts developed
11 in discovery fundamentally altered the facts alleged in petition or
12 claims made before the Court. Accordingly, the Court has properly
13 directed Respondents to address the claims raised in the petition,
14 and can grant the relief requested.
15

16 CONCLUSION

17 In closing, Petitioner would simply like to emphasize, it has
18 been over a year since his finding of suitability and nothing has
19 changed from the time of the parole grant to indicate that parole
20 should not occur.

21 While it is most certainly within this Court's discretion to
22 remand back to the Board, it is note-worthy to point out that
23 Respondents have had many opportunities to avail themselves of
24 available remedies, including the remedy fashioned by this Court,
25 but failed to do so. Given the fact that Respondents take the
26 position that the "equitable relief contemplated by the court
would be futile." Objections, page 9:24. There is no reason to
8 remand back to the Board.

In a somewhat analogous situation, the California Court of Appeals declined to remand to the Governor. The Court explained:

"Although the Board can give a prisoner a new hearing and consider additional evidence, the Governor's constitutional authority is limited to review of the materials provided by the Board. Since we have reviewed the materials that were before the Board and found no evidence to support a decision other than the one reached by the board, a remand to the Governor in this case would amount to an idle act." (In Re Smith, (2003) 109 Cal.App.4th 489, 507).

In the absence of any evidence in the record supporting the Board's decision, remanding the case for a new hearing would be futile, and the appropriate remedy is to grant the release of Petitioner. (McQuillion v. Duncan II (9th Cir., 2003) 342 F.3d 1012, 1015-1016).

Respondents have not cited any evidence, nor provided convincing argument refuting the points made in the Petition and outlined in Petitioner's previously filed informal response. They fail to address or justify their position in light of the order to Show Cause. Thus, the Court should grant the Petition and order Respondents to release Petitioner from incarceration forthwith.

Dated: December 23, 2005

Respectfully Submitted,

Michael Herro

Attorney for

Attorney for Petitioner

Eth M.

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5 Attorney for Petitioner Fred L. Baker

FILED

JUL 10 2006

LISA M. GALDOS
CLERK OF THE SUPERIOR COURT
DEPUTY
K. Richardson

SUPERIOR COURT OF MONTEREY COUNTY

IN AND FOR THE STATE OF CALIFORNIA

11 IN RE) HC 04990
12 FRED L. BAKER) AMENDED/SUPPLEMENTAL
13 ON HABEAS CORPUS) PETITION AND ATTACHMENTS
14) Dept. 9- Judge Anderson
15)
16)
17)

18 On June 5, 2006 an Order was issued by this Court granting
19 leave to Petitioner to file a supplement or amendment to his
20 original petition by addressing certain facts that in the
21 Court's view had not been raised expressly or implicitly in the
22 original petition and pleadings filed in this matter. The
23 Order stated any supplement or amendment be filed within 30
24 days of issuing the Order. It was mailed to counsel for
25 Petitioner. The Order was received on or about June 8, 2005.
26 Based on receiving service by mail, under C.C.P. 1013, this
27 amended/supplemental petition was to be filed within 35 days
28

1 from the date the Order issued.

2 Specifically, the Court gave Petitioner leave to address
3 whether the Board of Prison Terms lost jurisdiction to preside
4 over parole suitability hearings held subsequent to the
5 challenged September 24, 2004 hearing, pursuant to Penal Code
6 sections 3041(b), 2041, 2042 and 2451. Further, the Court
7 invited Petitioner to attach the following to any supplement or
8 amendment to the petition; 1.) the Board's written statement
9 recommending that parole be granted, 2.) forms and documents
10 generated and used by the Board in connection with Petitioner's
11 hearing, and 3.) a further declaration in which Declarant
12 properly authenticates and identifies documents referred to in
13 his declaration. The declaration referred to above is that of
14 Freddy Fikes, another inmate who was involved in a situation
15 were a portion of his parole suitability hearing was not tape
16 recorded, but a *de novo* rehearing wasn't necessary because the
17 Board could rely on certain documents produced as part of the
18 hearing in making their decision whether to grant or deny
19 parole.

20

21 AMENDMENT OF ORIGINAL PETITION TO INCLUDE CLAIM THAT BOARD LOST
22 JURISDICTION TO PRESIDE OVER "REHEARING" OF THE PAROLE
23 SUITABILITY HEARING CONDUCTED ON SEPTEMBER 24, 2004 BECAUSE OF
24 TIME LIMITS SET BY PENAL CODE SECTION 3041(B) AND CALIFORNIA
25 CODE OF REGULATIONS, TITLE 15, DIVISION TWO, SECTIONS 2041,
26 2042, 2044 AND 2451.

27 Petitioner hereby request that the above claim be amended
28 to and included as part of original petition for Habeas Corpus

1 filed in this matter on Jan. 27, 2005, as an additional ground
2 on which to base the Petitioner's claim for relief.

3 Petitioner was found suitable for parole following a full
4 hearing conducted on September 24, 2004. On November 30, 2006
5 the Decision Review Unit recommended that the 9/24/2004
6 decision be disapproved and that a rehearing be conducted on
7 the matter on the next available calender. Then, on December
8 14, 2004, the Board of Prison Terms voted disapprove of the
9 proposed decision to grant parole.

10 These actions were taken despite the time limits
11 delineated in 15 CCR 2041, and the other sections cited above,
12 and therefore were taken at a time when both the Decision
13 Review Unit and the Board of Prison Terms had lost jurisdiction
14 over the matter. The Traverse filed in this matter fully
15 addresses the statutory time limits referred to above,
16 appearing as section "II"; and is hereby incorporated by
17 reference. Petitioner respectfully request the Court consider
18 the legal citations and argument in the above mentioned
19 pleading as support for the above claim.

20 ATTACHMENTS

21 As previously stated, through the Order issued by the
22 Court on June 5, 2006, Petitioner was granted leave to attach
23 to this amended/supplemental petition certain documents.

24 Accordingly, the following have been attached;

25 1. "The Board's written statement recommending that parole be
26 granted."

27 Attached as Exhibit A to this amended/supplemental
28 petition is BPT Form 1001, generated and signed at the

1 September 24, 2004 hearing, a copy of which was obtained by
2 Petitioner from his Central File, which is kept at Correctional
3 Training Facility-Soledad, where he is incarcerated.

4 2. "Forms and documents generated and utilized by the Board in
5 connection with Petitioner's (Sept. 24, 2004) hearing."

6 Petitioner and his counsel made attempts to obtain
7 documents relevant to the above mentioned materials,
8 specifically the BPT 1000(b) [Setting a Term-Life Prisoner
9 Parole Granted] form that was generated as a result of
10 Petitioner's 9/24/2004 hearing. An informal request made by
11 Petitioner's counsel that any such "forms and documents" be
12 provided, pursuant to the Court's 6/5/2006 Order was made on or
13 around June 23, 2006. Counsel for the Respondents replied by
14 a two-page letter, dated June 28, 2006, which has been attached
15 to this amended/supplemental petition as Exhibit B.

16 The Petitioner himself also made efforts to obtain such
17 forms and documents through the prison where he is
18 incarcerated. A declaration by Petitioner, [which includes its
19 own exhibits, numbered 1-4], has been attached to this
20 amended/supplemental petition as Exhibit C.

21 Based on the above, Petitioner request that the Court
22 order Respondent to produce for review by both the Petitioner
23 and the Court the BPT 1000(b) form referenced above and any
24 other "forms and documents" that might be attached by
25 Petitioner in response to the Court's 6/5/2006 Order.

26 3. "A further declaration in which Declarant (Freddy Fikes)
27 properly authenticates and identifies the documents to which he
28 refers."

1 A declaration from Mr. Freddy Fikes, [with it's own
2 exhibits, labeled, by Declarant, Appendix B(2)(3) and (4)] has
3 been attached to this amended/supplemental petition Exhibit D.

4

5 Dated: July 10, 2006 Respectfully Submitted,

6 Michael Herro

7 Michael Herro, Attorney for Petitioner

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Exh N

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FILED

JUL 10 2006

LISA M. GALDOS
CLERK OF THE SUPERIOR COURT
K. K. KELSON DEPUTY

SUPERIOR COURT OF MONTEREY COUNTY

IN AND FOR THE STATE OF CALIFORNIA

IN RE
FRED L. BAKER
ON HABEAS CORPUS

HC 04990

AMENDED/SUPPLEMENTAL

PETITION AND ATTACHMENTS

Dept. 9- Judge Anderson

On June 5, 2006 an Order was issued by this Court granting leave to Petitioner to file a supplement or amendment to his original petition by addressing certain facts that in the Court's view had not been raised expressly or implicitly in the original petition and pleadings filed in this matter. The Order stated any supplement or amendment be filed within 30 days of issuing the Order. It was mailed to counsel for Petitioner. The Order was received on or about June 8, 2005. Based on receiving service by mail, under C.C.P. 1013, this amended/supplemental petition was to be filed within 35 days

1 from the date the Order issued.

2 Specifically, the Court gave Petitioner leave to address
3 whether the Board of Prison Terms lost jurisdiction to preside
4 over parole suitability hearings held subsequent to the
5 challenged September 24, 2004 hearing, pursuant to Penal Code
6 sections 3041(b), 2041, 2042 and 2451. Further, the Court
7 invited Petitioner to attach the following to any supplement or
8 amendment to the petition; 1.) the Board's written statement
9 recommending that parole be granted, 2.) forms and documents
10 generated and used by the Board in connection with Petitioner's
11 hearing, and 3.) a further declaration in which Declarant
12 properly authenticates and identifies documents referred to in
13 his declaration. The declaration referred to above is that of
14 Freddy Fikes, another inmate who was involved in a situation
15 were a portion of his parole suitability hearing was not tape
16 recorded, but a *de novo* rehearing wasn't necessary because the
17 Board could rely on certain documents produced as part of the
18 hearing in making their decision whether to grant or deny
19 parole.

20
21 AMENDMENT OF ORIGINAL PETITION TO INCLUDE CLAIM THAT BOARD LOST
22 JURISDICTION TO PRESIDE OVER "REHEARING" OF THE PAROLE
23 SUITABILITY HEARING CONDUCTED ON SEPTEMBER 24, 2004 BECAUSE OF
24 TIME LIMITS SET BY PENAL CODE SECTION 3041(B) AND CALIFORNIA
25 CODE OF REGULATIONS, TITLE 15, DIVISION TWO, SECTIONS 2041,
26 2042, 2044 AND 2451.

27 Petitioner hereby request that the above claim be amended
28 to and included as part of original petition for Habeas Corpus

1 filed in this matter on Jan. 27, 2005, as an additional ground
2 on which to base the Petitioner's claim for relief.

3 Petitioner was found suitable for parole following a full
4 hearing conducted on September 24, 2004. On November 30, 2006
5 the Decision Review Unit recommended that the 9/24/2004
6 decision be disapproved and that a rehearing be conducted on
7 the matter on the next available calendar. Then, on December
8 14, 2004, the Board of Prison Terms voted disapprove of the
9 proposed decision to grant parole.

10 These actions were taken despite the time limits
11 delineated in 15 CCR 2041, and the other sections cited above,
12 and therefore were taken at a time when both the Decision
13 Review Unit and the Board of Prison Terms had lost jurisdiction
14 over the matter. The Traverse filed in this matter fully
15 addresses the statutory time limits referred to above,
16 appearing as section "II", and is hereby incorporated by
17 reference. Petitioner respectfully request the Court consider
18 the legal citations and argument in the above mentioned
19 pleading as support for the above claim.

20 ATTACHMENTS

21 As previously stated, through the Order issued by the
22 Court on June 5, 2006, Petitioner was granted leave to attach
23 to this amended/supplemental petition certain documents.

24 Accordingly, the following have been attached;

- 25 1. "The Board's written statement recommending that parole be
26 granted."

27 Attached as Exhibit A to this amended/supplemental
28 petition is BPT Form 1001, generated and signed at the

1 September 24, 2004 hearing, a copy of which was obtained by
2 Petitioner from his Central File, which is kept at Correctional
3 Training Facility-Soledad, where he is incarcerated.

4 2. "Forms and documents generated and utilized by the Board in
5 connection with Petitioner's (Sept. 24, 2004) hearing."

6 Petitioner and his counsel made attempts to obtain
7 documents relevant to the above mentioned materials,
8 specifically the BPT 1000(b) [Setting a Term-Life Prisoner
9 Parole Granted] form that was generated as a result of
10 Petitioner's 9/24/2004 hearing. an informal request made by

11 Petitioner's counsel that any such "forms and documents" be
12 provided, pursuant to the Court's 6/5/2006 Order was made on or
13 around June 23, 2006. Counsel for the Respondents replied by
14 a two-page letter, dated June 28, 2006, which has been attached
15 to this amended/supplemental petition as Exhibit B.

16 The Petitioner himself also made efforts to obtain such
17 forms and documents through the prison where he is
18 incarcerated. A declaration by Petitioner, [which includes its
19 own exhibits, numbered 1-4], has been attached to this
20 amended/supplemental petition as Exhibit C.

21 Based on the above, Petitioner request that the Court
22 order Respondent to produce for review by both the Petitioner
23 and the Court the BPT 1000(b) form referenced above and any
24 other "forms and documents" that might be attached by
25 Petitioner in response to the Court's 6/5/2006 Order.

26 3. "A further declaration in which Declarant (Freddy Fikes)
27 properly authenticates and identifies the documents to which he
28 refers."

1 A declaration from Mr. Freddy Fikes, [with it's own
2 exhibits, labeled, by Declarant, Appendix B(2)(3) and (4)] has
3 been attached to this amended/supplemental petition Exhibit D.

4

5 Dated: July 10, 2006 Respectfully Submitted,

6 Michael Herro

7 Michael Herro, Attorney for Petitioner

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Exhibit N.

1 SUPERIOR COURT OF CALIFORNIA
2
3 COUNTY OF MONTEREY

4 In re) Case No.: HC 4990
5 Fred L. Baker (C-22918)) ORDER
6 On Habeas Corpus.)

7
8 Petitioner brought a writ of habeas corpus in which he contends that The Board of
9 Prison Terms violated his right to Due Process by rescinding its September 24, 2004 parole
10 suitability finding. The sole reason for the Board's rescission was that a portion of the parole
11 suitability hearing was not transcribed. Only a partial transcript could be obtained either
12 because the tape recorder malfunctioned or because the Board only provided one of two
13 hearing tapes for transcription. Petitioner argues that he should not be punished for the Board's
14 failure to operate its recording equipment or failure to ensure that all hearing tapes were
15 submitted for transcription.

16 Subsequent to the filing of the writ, the Board conducted a *de novo* hearing before the
17 original hearing panel. The panel then reversed its previous finding of suitability. Petitioner
18 now avers that a proper record could have been made without conducting a *de novo* hearing.
19 This claim was neither expressly nor implicitly raised in the habeas petition, as it was entirely
20 unknown at the time the writ was filed what process would be undertaken by the Board to
21 remedy the Board's error.

22 The Court issued an Order to Show Cause, noting that Penal Code section 3042(b)¹
23 places the duty on the Board, not the inmate, to record and transcribe parole suitability

24
25 ¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

1 hearings. The Court ordered Respondent to show cause why any rescheduled hearing should
2 not be before the same Board members with instructions to issue a Decision recommending
3 parole, and to address the apparent inequity created by Respondent's interpretation of the law.
4 In the Court's view, the most equitable solution involved (1) the adoption by panel members of
5 the existing transcript and the documents created or relied upon by the Board at the hearing,
6 and (2) a recreation of the panel's Decision based upon the transcript and documents, together
7 with the independent recollections of panel members.

8 Respondent defended the Board's actions as proper, arguing that Sections 3041(b),
9 3041.1, and 3042(b)-(c) require that all portions of a suitability hearing be transcribed to ensure
10 that the Governor is not deprived of his statutory right to review a grant of parole. In this,
11 Respondent errs. The sections cited by Respondent merely provide a process for the review of
12 a parole hearing decision. No mandate is set forth requiring a rehearing where, as here, the
13 recording equipment malfunctions or staff simply neglects to produce all tapes for
14 transcription. A hearing record is sufficient for purposes of review whether it be made by
15 transcript or *written summary*. "A record (a verbatim transcript, tape recording or written
16 summary) shall be made of all hearings. The record of hearing shall include or incorporate by
17 reference the evidence considered, the evidence relied on, and the findings of the hearing panel
18 with supporting reasons." 15 CCR sec. 2254 (emphasis added).

19 Respondent failed to analyze or discuss the relevant equities of the matter, asserting that
20 "the court improperly directed Respondent to justify holding a rehearing rather than having the
21 panel recreate its decision . . ." It is the function of the court to discover the truth of factual
22 allegations set forth by a petitioner, and to provide justice by fashioning a remedy where the
23 petitioner has stated a *prima facie* case. *Board of Prison Terms v. Superior Court* (2005) 130
24 Cal.App.4th 1212. A court is not constrained in its crafting of an appropriate remedy simply
25 because an action has been inartfully pled. Nevertheless, a court's power under Section 1484

1 "to do and perform all other acts and things necessary to a full and fair hearing and
2 determination of the case" is limited. Pen. Code sec. 1484. "The superior court's power under
3 section 1484 does not authorize the court to consider new claims not expressly or implicitly
4 raised in the original habeas petition or supported by the factual allegations in the original
5 habeas petition unless those claims have been asserted in a supplemental habeas petition filed
6 with the permission of the court." *Id.*, at pp. 1238-39 (emphasis added).

7 Petitioner filed his Traverse/Response, a motion to amend the Traverse/Response, and a
8 Request for Judicial Notice. Respondent filed an opposition and objection, and Petitioner filed
9 his response thereto. Petitioner asserts that the Decision granting parole was in accordance
10 with the law, even if the hearing transcript is incomplete. Petitioner maintains that he, the
11 victim and others were given an opportunity to be heard, and that "a written statement setting
12 forth the recommendation of parole was generated, as were documents regarding the condition
13 of release and consequences for failure to meet those conditions." The Court notes that the
14 California Department of Corrections and Rehabilitation (CDCR) generates specific forms
15 utilized by the Board during parole consideration hearings, including BPT Form 1000(a) [Life
16 Prisoner Parole Consideration Worksheet], Form 1000(b) [Setting a Term-Life Prisoner Parole
17 Granted], and Form 1005 [Life Prisoner: Parole Consideration Proposed Decision]. DOM sec.
18 74040.5.3 ("Required BPT Forms (Life Cases)"). It is mandated that the forms be prepared
19 prior to the hearing and utilized during the hearing. DOM secs. 74040.5.3, 74040.5.4.

20 Petitioner requests that the Court take judicial notice of blank BPT worksheets (BPT
21 Forms 1000(a)-(b) used by Board members during the hearings to justify their decision to grant
22 or deny parole. Judicial notice may be taken of facts and propositions which are not reasonably
23 subject to dispute and are subject to immediate and accurate determination through sources of
24 reasonably undisputable accuracy. Evid. Code sec. 452(h). A court must take judicial notice
25 of such matters if the requesting party provides sufficient notice to the adverse party, and

1 furnishes the court with sufficient information to comply with the party's request. Evid. Code
2 sec. 453. Here, the forms subject to the request are promulgated and utilized by Respondent,
3 and appear to be blank copies of documents which the Board was required to utilize during
4 Petitioner's initial hearing. DOM secs. 74040.5.3, 74040.5.4. The documents bear BPT Form
5 numbers 1000(a) and 1000(b), respectively. Respondent does not dispute the existence or
6 accuracy of these forms. Accordingly, the Court takes judicial notice of the blank BPT Forms
7 1000(a)-(b) as Parole consideration worksheets utilized by the Board in considering an
8 inmate's suitability for parole.

9 Petitioner further requests that the Court judicially notice a document entitled "Review
10 of Proposed Decision," BPT Form 1138. The document appears to embody an administrative
11 act of the Board, and is executed by Chief Counsel David E. Brown and Chief Deputy
12 Commissioner James B. Dowling. Administrative acts are subject to judicial notice. Evid.
13 Code sec. 452(c). The Court has reviewed a declaration appended to the document, in which
14 the declarant identifies the document and the purpose for which it was created. The declarant
15 states that a portion of his hearing transcript was unrecorded due to an alleged problem with the
16 recording equipment. There, the Board did not conduct a new hearing but instead utilized the
17 decision worksheet "to complete the process." Declarant attempts to incorporate by reference
18 the Review of Proposed Decision into his declaration. The document indicates that in
19 Declarant's case, the recommendations by the Decision Review Unit to (1) append an errata
20 sheet to the transcript which set forth the information on the Life Prisoner Parole Consideration
21 Worksheet, and (2) check the box on the title page of the transcript indicating that an errata
22 sheet was prepared, were approved by the Board. Judicial notice of the authenticity and
23 contents of an official document does not serve to establish the truth of all the recitals therein,
24 nor render admissible those matters which are inadmissible. 1 Witkin, Cal. Evid. (4th ed.) sec.
25 19; Evid. Code sec. 452(c). Accordingly, the Court takes judicial notice of the Board's official

1 act in utilizing Form 1138 in its determination of Declarant's parole suitability, but not the
2 veracity of the facts alleged therein.

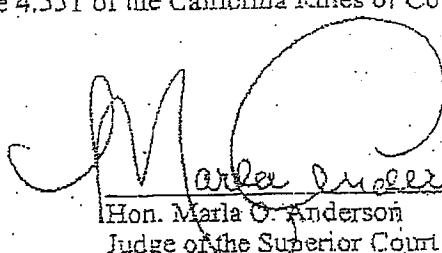
3 The Traverse/Response further sets forth Petitioner's claim that the Board lacked
4 jurisdiction to preside over his parole suitability hearing given the time constraints of Sections
5 3041(b), 2041, 2042 and 2451. The Court takes no position as to the merits of this claim, as it
6 was neither raised in the original petition nor supported by the factual allegations contained
7 therein. *Board of Prison Terms v. Superior Court, supra*, 130 Cal.App.4th at 1238-39.
8 Nevertheless, where the "superior court determines that the habeas petition has pleading
9 defects and believes that a correction of the defects is necessary to ensure a full and fair
10 hearings and a determination of the case, the superior court has the discretion to give notice of
11 the defect and grant leave to amend or supplement the petition." *Id.*, at 1239 (citing *People v.*
12 *Handcock* (1983) 145 Cal.App.3d Supp. 25, 32-33).

13 The Court finds that the instant petition contains pleading defects which must be
14 corrected in order to ensure that Petitioner receives a fair and complete determination of his
15 claims. The underlying petition solely challenged the fact of the Board's rescission of its
16 suitability finding. Subsequent to the discovery of new facts during the course of discovery,
17 Petitioner developed additional theories of relief, which addressed, *inter alia*, the process
18 involved in the rescission. In the interests of justice and as contemplated by Section 1484, the
19 Court now grants Petitioner leave to amend or supplement his petition by addressing those facts
20 and theories relevant to the Board's rescission which were not expressly or implicitly raised in
21 the petition, as set forth hereinabove. Petitioner is invited to attach to the amended or
22 supplemental petition the following: (1) the Board's written statement recommending that
23 parole be granted; (2) forms and documents generated and utilized by the Board in connection
24 with Petitioner's hearing; and (3) a further declaration in which Declarant properly
25 authenticates and identifies the documents to which he refers. Petitioner shall have 30 days

1 from the date of this Order in which to file his amended or supplemental petition; all other
2 filing timelines shall be in accordance with Rule 4.551 of the California Rules of Court.

3 IT IS SO ORDERED.

4 Dated:

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Hon. Marla O. Anderson
6 Judge of the Superior Court

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Exhibit O.

1 Michael Herro, Attorney at Law
2 SBN: 233749
3 Law Office of Michael Herro
4 134 Central Ave.
5 Salinas, California 93901
6 Phone and fax (831) 753-0992
7 Attorney for Petitioner Fred L. Baker

FILED

JUL 10 2006

LISA M. GALDOS
CLERK OF THE SUPERIOR COURT
X. Hanson DEPUTY

SUPERIOR COURT OF MONTEREY COUNTY
IN AND FOR THE STATE OF CALIFORNIA

10
11 IN RE HC 04990
12 FRED L. BAKER) AMENDED/SUPPLEMENTAL
13 ON HABEAS CORPUS) PETITION AND ATTACHMENTS
14) Dept. 9- Judge Anderson
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On June 5, 2006 an Order was issued by this Court granting leave to Petitioner to file a supplement or amendment to his original petition by addressing certain facts that in the Court's view had not been raised expressly or implicitly in the original petition and pleadings filed in this matter. The Order stated any supplement or amendment be filed within 30 days of issuing the Order. It was mailed to counsel for Petitioner. The Order was received on or about June 8, 2005. Based on receiving service by mail, under C.C.P. 1013, this amended/supplemental petition was to be filed within 35 days

1 from the date the Order issued.

2 Specifically, the Court gave Petitioner leave to address
3 whether the Board of Prison Terms lost jurisdiction to preside
4 over parole suitability hearings held subsequent to the
5 challenged September 24, 2004 hearing, pursuant to Penal Code
6 sections 3041(b), 2041, 2042 and 2451. Further, the Court
7 invited Petitioner to attach the following to any supplement or
8 amendment to the petition; 1.) the Board's written statement
9 recommending that parole be granted, 2.) forms and documents
10 generated and used by the Board in connection with Petitioner's
11 hearing, and 3.) a further declaration in which Declarant
12 properly authenticates and identifies documents referred to in
13 his declaration. The declaration referred to above is that of
14 Freddy Fikes, another inmate who was involved in a situation
15 where a portion of his parole suitability hearing was not tape
16 recorded, but a *de novo* rehearing wasn't necessary because the
17 Board could rely on certain documents produced as part of the
18 hearing in making their decision whether to grant or deny
19 parole.

20

21 AMENDMENT OF ORIGINAL PETITION TO INCLUDE CLAIM THAT BOARD LOST
22 JURISDICTION TO PRESIDE OVER "REHEARING" OF THE PAROLE
23 SUITABILITY HEARING CONDUCTED ON SEPTEMBER 24, 2004 BECAUSE OF
24 TIME LIMITS SET BY PENAL CODE SECTION 3041(B) AND CALIFORNIA
25 CODE OF REGULATIONS, TITLE 15, DIVISION TWO, SECTIONS 2041,
26 2042, 2044 AND 2451.

27 Petitioner hereby request that the above claim be amended
28 to and included as part of original petition for Habeas Corpus

1 filed in this matter on Jan. 27, 2005, as an additional ground
2 on which to base the Petitioner's claim for relief.

3 Petitioner was found suitable for parole following a full
4 hearing conducted on September 24, 2004. On November 30, 2006
5 the Decision Review Unit recommended that the 9/24/2004
6 decision be disapproved and that a rehearing be conducted on
7 the matter on the next available calender. Then, on December
8 14, 2004, the Board of Prison Terms voted disapprove of the
9 proposed decision to grant parole.

10 These actions were taken despite the time limits
11 delineated in 15 CCR 2041, and the other sections cited above,
12 and therefore were taken at a time when both the Decision
13 Review Unit and the Board of Prison Terms had lost jurisdiction
14 over the matter. The Traverse filed in this matter fully
15 addresses the statutory time limits referred to above,
16 appearing as section "II", and is hereby incorporated by
17 reference. Petitioner respectfully request the Court consider
18 the legal citations and argument in the above mentioned
19 pleading as support for the above claim.

20 ATTACHMENTS

21 As previously stated, through the Order issued by the
22 Court on June 5, 2006, Petitioner was granted leave to attach
23 to this amended/supplemental petition certain documents.

24 Accordingly, the following have been attached;

25 1. "The Board's written statement recommending that parole be
26 granted."

27 Attached as Exhibit A to this amended/supplemental
28 petition is BPT Form 1001, generated and signed at the

1 September 24, 2004 hearing, a copy of which was obtained by
2 Petitioner from his Central File, which is kept at Correctional
3 Training Facility-Soledad, where he is incarcerated.

4 2. "Forms and documents generated and utilized by the Board in
5 connection with Petitioner's (Sept. 24, 2004) hearing."

6 Petitioner and his counsel made attempts to obtain
7 documents relevant to the above mentioned materials,
8 specifically the BPT 1000(b) [Setting a Term-Life Prisoner
9 Parole Granted] form that was generated as a result of
10 Petitioner's 9/24/2004 hearing. An informal request made by
11 Petitioner's counsel that any such "forms and documents" be
12 provided, pursuant to the Court's 6/5/2006 Order was made on or
13 around June 23, 2006. Counsel for the Respondents replied by
14 a two-page letter, dated June 28, 2006, which has been attached
15 to this amended/supplemental petition as Exhibit B.

16 The Petitioner himself also made efforts to obtain such
17 forms and documents through the prison where he is
18 incarcerated. A declaration by Petitioner, [which includes its
19 own exhibits, numbered 1-4], has been attached to this
20 amended/supplemental petition as Exhibit C.

21 Based on the above, Petitioner request that the Court
22 order Respondent to produce for review by both the Petitioner
23 and the Court the BPT 1000(b) form referenced above and any
24 other "forms and documents" that might be attached by
25 Petitioner in response to the Court's 6/5/2006 Order.

26 3. "A further declaration in which Declarant (Freddy Fikes)
27 properly authenticates and identifies the documents to which he
28 refers."

1 A declaration from Mr. Freddy Fikes, [with it's own
2 exhibits, labeled, by Declarant, Appendix B(2)(3) and (4)] has
3 been attached to this amended/supplemental petition Exhibit D.

4

5 Dated: July 10, 2006 Respectfully Submitted,
6 Michael Herro
7 Michael Herro, Attorney for Petitioner

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EXHIBIT A

BOARD OF PRISON TERMS

LIFE PRISONER HEARING DECISION FACE SHEET

 PAROLE GRANTED - (YES)

CDC: Do not release prisoner before

Governor's review

*Do not release until review*Records Use Only

Parole Release Date

YR MO DAY

 PAROLE DENIED - (NO)

Attach Prison Calculation Sheet

 AGREED UNSUITABLE (Attach 1001A Form) FOR: _____ YEAR(S) HEARING POSTPONED/REASON: _____

PANEL RECOMMENDATIONS AND REQUESTS

The Board Recommends:

 No more 115's or 128A's Stay discipline free Work to reduce custody level Learn a trade* Get self-help* *Continue* Get therapy* Earn positive chronos Get a GED* Recommend transfer to _____ Other _____

*These programs are recommended if they are offered at your prison and you are eligible/able to participate.

Penal Code 3042 Notices

[X] Sent Date: 8/6/04

Commitment Offense(s)

P209 W/12022.5

KIDNAP FOR ROBBERY W/USE F'ARM

Code(s)

Crime(s)

CR17643

6

Case #(s)

Count #(s)

Date Inmate Came to CDC
11/6/80

Date Life Term Began

Minimum Eligible Parole Date
7/31/94 Initial Hearing

[X] Subsequent (Hearing No.) 7

Date of Last Hearing

CDC Representative

Attorney for Prisoner

Address

D.A. Representative

County

This form and the Board's decision at the end of the hearing is only proposed and NOT FINAL. It will not become final until it is reviewed.

Chair

Susan Fisher

Date

9/24/04

Panel Member

Al Lendingia

Date

10/4

Panel Member

Hollis D. King

Date

NAME BAKER, FRED

CDC # C22918

PRISON CTF

CALENDAR 9/04

DATE

EXHIBIT B

BILL LOCKER
Attorney General

State of California
DEPARTMENT OF JUSTICE



455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Public: (415) 703-5500
Telephone: (415) 703-5531
Facsimile: (415) 703-5843
E-Mail: Denise.Yates@doj.ca.gov

June 28, 2006

VIA FACSIMILE

Michael Herro, Attorney at Law
Law Office of Michael Herro
134 Central Ave.
Salinas, CA 93901
Fax: (831) 753-0992

**RE: In re Fred L. Baker (C-22918), On Habeas Corpus
Superior Court of California, County of Monterey, Case No. HC 4990**

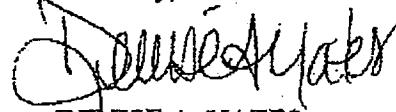
Dear Mr. Herro:

I am writing in response to your telephone message of June 26, 2006, in which you informally requested some Board documents. You requested a copy of the BPT form 1000(b) from Baker's September 24, 2004 hearing. You also requested a copy of the other documents referenced in the court's June 5, 2006 Order. The BPT form 1000(b) is a worksheet that the commissioners use as a guide in announcing their decision. The worksheet is not meant to be placed in the central file nor is it regularly maintained by the Board. The court's statement that the BPT forms 1000(a) and (b) are prepared before the hearing and utilized by the Board during the hearing reflects a misunderstanding of the Department Operations Manual. The BPT forms 1000(a) and (b) are the forms used when the Board denies or grants a life prisoner parole, respectively. (Dep't Operations Manual, § 74040.5.3.) Obviously, the Board does not prepare these forms before the hearing because it does not yet know if it will deny or grant the prisoner parole. Rather, the case records staff simply makes these forms available to the commissioners for use at the hearing, if necessary. (See *id.*, § 74040.5.4.)

Mr. Michael Herro
June 28, 2006
Page 2

Regarding your second request, I am unable and unwilling to respond to it. If you are referring to the court's comment that you should amend or supplement the petition with "forms and documents generated and utilized by the Board in connection with Petitioner's hearing," your request is ambiguous. I do not know the total documents you or the court are referring to. Until you can specify which documents you are requesting and confirm that they are not in your client's central file, I cannot provide a better response. Thank you for your consideration.

Sincerely,



DENISE A. YATES
Deputy Attorney General

For BILL LOCKYER
Attorney General

EXHIBIT C

1 Michael Herro, Attorney at Law
2 SBN: 233749
3 Law Office of Michael Herro
4 134 Central Ave.
5 Salinas, California 93901
6 Phone and fax (831) 752-0992

7 Attorney for Petitioner

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11 SUPERIOR COURT OF CALIFORNIA

12 COUNTY OF MONTEREY

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16 In re) HC 04990
17 FRED BAKER,) DECLARATION OF FRED BAKER (C-22918)
18 On Habeas Corpus.)
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I, FRED BAKER, hereby declare that if called as a witness, I would competently testify as follows:

1. I am a resident of the state of California, County of Monterey and the Petitioner in this matter.

2. On June 8, 2006, I received a copy of the Court's order granting me leave to amend or supplement my petition, and attach thereto: 1) the Board's written statement recommending parole be granted; 2) forms and documents generated and utilized by the Board in connection with my September 2004 hearing; and 3) a further declaration in which Declarant (Freddy Fikes) properly authenticates and identifies the documents to which refers. See (Decl-Ex. 1.)

3. On June 9, 2006, at approximately 9:30 a.m., I contacted Correctional Counselor (CCI) Williams, via institutional phone and

1 and requested a copy of the information specified by the Court.
2 Specifically, the worksheet utilized by the Board bearing BPT form
3 number 1000(b)[Setting a Term-Life Prisoner Parole Grant], as well
4 as all forms and documents generated and utilized by the Board in
connection with the September 2004 hearing. CCI Williams instructed
6 me to submit a Multi-Purpose Form (CTF-304), listing the documents
I needed. Upon conclusion of the call I submitted the form. See
(Decl-Ex. 2.) However, due to conflicting work hours and the hours
in which I can access the law library, I was unable to attach a copy
of the Court order with the request.

11 4. Accordingly, on June 11, 2006, I obtained copies of the
Court Order.

13 5. On June 13, 2006, I submitted a subsequent Multi-Purpose
Form to CCI Williams, attached thereto a copy of the Order. See
(Decl-Ex. 3.)

16 6. On June 16, 2006, CCI Williams called me to the housing
unit office for an "Olsen's Review" to review my Central File. Upon
reviewing the file, in the presences of CCI Williams, I noted the
BPT 1000(b) form was not part of the file. I then asked CCI Williams
was he able to locate the documents requested per the Court order, at
which point he stated that he had sent copies of everything he could
find in connection with the September 24, 2004 hearing. A copy of
those documents are attached to this declaration as declarant's exhibit
number four. See (Decl-Ex. 4.)

25 7. After further inquiring about the requested material, I was
told to "have your attorney call me at my number here at the
26 institution ext. # 4347, and I [Williams] will let him know that those
27 documents are not part of the C-file.")

1 I declare under penalty of perjury under the laws of the State
2 of California that the foregoing is true and correct. My expressions
3 of belief as to each specified fact are based on the reasons I have
4 given as to each such fact. I am willing to testify to the same in
5 a court of law. I so swear, this 18 day of June, 2006, at Soledad,
6 California.

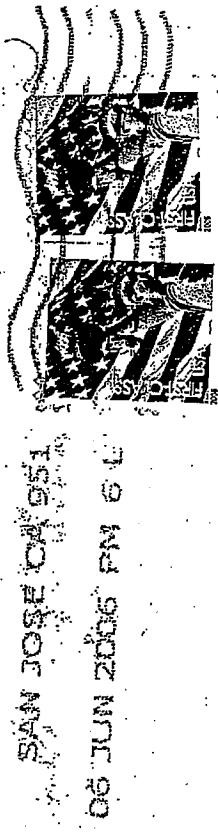


Fred Baker
Declarant

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DECL.-EXHIBIT 1

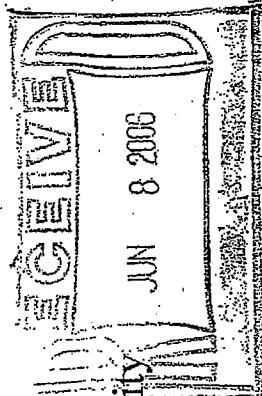
Michael Herro
Attorney at Law
134 Central Avenue
Salinas, Ca 93901



LEGAL MAIL

LEGAL AND CONFIDENTIAL

Mr. Fred L. Baker
C-22918, B-321
Correctional Training Facility JUN 8 2006
P.O. Box 689
Soledad, Ca. 93960-0689



RECORDED MAIL



LISA M. GALDOS
Court Executive Officer
and Jury Commissioner

SUPERIOR COURT OF CALIFORNIA COUNTY OF MONTEREY

Fax

Salinas Division
240 Church St., Suite 319
Salinas, CA 93901
(831) 775-5400

Monterey Division
1200 Aguirre Road
Monterey, CA 93940
(831) 647-5800

Marina Division
3180 Del Monte Blvd
Marina, CA 93933
(831) 883-5300

King City Division
250 Franciscan Way
King City, CA 93930
(831) 396-5200

<http://www.co.monterey.ca.us/court/>

TO: Michael Herro

FAX NO.: 753-0992

FROM: Heidi Whilden

DATE: June 5, 2006

NUMBER OF PAGES IN THIS FAX: 7 (including cover)

The information contained in this facsimile transmission may be confidential, and may be legally protected attorney work-product, or may be inside information. This information is intended only for the use of the recipient(s) named below. If you have received this information in error, please immediately notify us by telephone to arrange for return of all documents. Any unauthorized disclosure, distribution, or taking of any action in reliance on the contents of this information is strictly prohibited and may be unlawful.

COMMENTS:

Attached is a courtesy copy of the Judge's ruling in the Baker matter. It is undated and will bear the date on which it is filed by the habeas clerk. I will request that the clerk file and process the order today.

THE MISSION OF THE COURT IS TO DISPENSE JUSTICE IN ALL MATTERS WITHIN ITS JURISDICTION IN AN IMPARTIAL MANNER AND IN ACCORDANCE WITH THE LAW

DECL.-EXHIBIT 2

MULTI-PURPOSE FORM

TO: Williams
(Name)CCI
(Title)DATE: 6/9/06

- MEDICAL CONCERN
- DENTAL CONCERN
- VISITING CONCERN
- REQUEST FOR INTERVIEW
- PACKAGE ROOM
- REQUEST FOR I.D. CARD
- REQUEST TO REVIEW CENTRAL FILE
- MAIL ROOM: Request for metered envelopes (No Funds)
- E.P.R.D.: You should be within six (6) months of release date to inquire
- TRUST ACCOUNT BALANCE \$ _____
- TRUST ACCOUNT WITHDRAWAL
- REQUEST FOR ROOM CHANGE
- REQUEST FOR UNIT CHANGE
- FAMILY HOUSING UNIT VISIT INTERVIEW
- REQUEST FOR CHAPLAIN INTERVIEW
- MEDICALLY CLEARED FOR CULINARY REQUEST

REASON FOR REQUEST (Be specific: Explain your problem): I need a copy of the following documents from my C-file pertaining to my September 24, 2004 parole hearing. This request is made pursuant to the Monterey Superior's Court Order of June 2, 2006. The Board's written statement recommends

DATE: _____ STAFF RESPONSE: _____

INMATE NAME: Baker, F. INMATE NUMBER: C 22918 CELL: B-321
ASSIGNMENT: CLOTHING HOURS: 0630 Hrs - 1430 Hrs RDO'S: S/S/H

CTF-304 (Rev. 04-05)

B 321 L
see Reverse Side

that parole be granted; ²⁾ BPT-1000(b) Worksheet; ³⁾ BPT-1136(a) Review of Proposed Decision; and ⁴⁾ all forms and documents generated and utilized by the Board in connection with the Sept. 2004 hearing.

Your assistance in this matter is greatly needed and appreciated.

Respectfully, F Baker

Thank you

DECL.-EXHIBIT 3

MULTI-PURPOSE FORM

TO: Williams (Name) CCI (Title) DATE: 6/13/2006

- | | |
|---------------------------------------------------------------------------------------------------|-----------------------------------------------------------------|
| <input type="checkbox"/> MEDICAL CONCERN | <input type="checkbox"/> TRUST ACCOUNT BALANCE \$ _____ |
| <input type="checkbox"/> DENTAL CONCERN | <input type="checkbox"/> TRUST ACCOUNT WITHDRAWAL |
| <input type="checkbox"/> VISITING CONCERN | <input type="checkbox"/> REQUEST FOR ROOM CHANGE |
| <input type="checkbox"/> REQUEST FOR INTERVIEW | <input type="checkbox"/> REQUEST FOR UNIT CHANGE |
| <input type="checkbox"/> PACKAGE ROOM | <input type="checkbox"/> FAMILY HOUSING UNIT VISIT INTERVIEW |
| <input type="checkbox"/> REQUEST FOR I.D. CARD | <input type="checkbox"/> REQUEST FOR CHAPLAIN INTERVIEW |
| <input type="checkbox"/> REQUEST TO REVIEW CENTRAL FILE | <input type="checkbox"/> MEDICALLY CLEARED FOR CULINARY REQUEST |
| <input type="checkbox"/> MAIL ROOM: Request for metered envelopes (<i>No Funds</i>) | (Please see reverse side) |
| <input type="checkbox"/> E.P.R.D.: You should be within six (6) months of release date to inquire | |

(Please see reverse side)

REASON FOR REQUEST (Be specific: Explain your problem): On June 9, 2006, I contacted you concerning a recent Court order (HC 04990) I received requiring a copy of specific documents from my C-file in connection with my September 24, 2004, parole hearing. You advised me to submit a multi-purpose form, which I did, listing the items. However, due to a lack of access to a copier at that time,

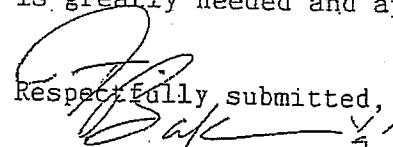
DATE: _____ STAFF RESPONSE: _____

INMATE NAME: Baker, F. INMATE NUMBER: C-22918 CELL: B-321L
ASSIGNMENT: Clothing Room HOURS: 0630 Hrs - 1430 Hrs. RDO'S: S/S/H
CTF-303 (Rev. 04-97)

(con't)

I was unable to attach a copy of the Court order. A copy of that Order is attached to this multi-purpose form. Please see page 4, lines 2-6, and 5, lines 22-24. The documents are needed asap due to time restraints. Your assistance in this matter is greatly needed and appreciated.

Respectfully submitted,


F. Baker C-22918

DECL.-EXHIBIT 4

Board of Prison Terms

State of California

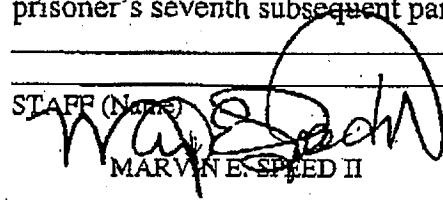
MISCELLANEOUS DECISION**FACTS**

During the December 14, 2004 Executive Meeting of the Board of Prison Terms, the Board, sitting en banc, considered the findings of the Decision Review Unit regarding the proposed decision dated September 24, 2004, for life prisoner Fred Baker, C-22918. Following consideration, the full Board voted to disapprove the proposed decision of September 24, 2004, and schedule a rehearing of the prisoner's seventh subsequent parole consideration hearing on the next available calendar.

DECISION(S)

Disapprove the September 24, 2004 proposed decision and schedule a rehearing of the prisoner's seventh subsequent parole consideration hearing on the next available calendar.

STAFF NAME



MARVIN E. SPEED II

TITLE

Executive Officer

DATE

12-20-04

NAME

BAKER, Fred

NUMBER

C-22918

INSTITUTION

CTF

Board of Prison Terms

State of California

MISCELLANEOUS DECISION**FACTS**

During the December 14, 2004 Executive Meeting of the Board of Prison Terms, the Board, sitting en banc, considered the findings of the Decision Review Unit regarding the proposed decision dated September 24, 2004, for life prisoner Fred Baker, C-22918. Following consideration, the full Board voted to disapprove the proposed decision of September 24, 2004, and schedule a rehearing of the prisoner's seventh subsequent parole consideration hearing on the next available calendar.

DECISION(S)

Disapprove the September 24, 2004 proposed decision and schedule a rehearing of the prisoner's seventh subsequent parole consideration hearing on the next available calendar.

STAFF NAME <i>Marvin E. Speed II</i>	TITLE Executive Officer	DATE <i>12-20-04</i>
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NAME BAKER, Fred	NUMBER C-22918	INSTITUTION CTF
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LIFE PRISONER PAROLE CONSIDERATION WORKSHEET INITIAL HEARING SUBSEQUENT HEARING

PRISONER'S NAME	Baker	CDC NUMBER	C22918
DATE OF HEARING		LOCATION	CTF

LEGAL STATUS

DATE RECEIVED	11-6-80	DATE LIFE TERM STARTS (IF DIFFERENT)		COUNTY	Riverside
OFFENSE	Kidnap for Robbery While Armed			CASE NUMBER	CR217643
COUNT NUMBER(S)	06	PENAL CODE SECTION(S) VIOLATED			P209 WTP12022.5
TERMS	7 to Life			MEPD	7-31-94

OTHER COMMITMENT OFFENSES OR STAYED COUNTS

STAYED	OFFENSE	CODE SECTION	COUNTY	CASE NUMBER	COUNT NUMBER
<input type="checkbox"/>					
<input type="checkbox"/>					
<input type="checkbox"/>					

PRESENT AT HEARING

PANEL MEMBER	PANEL MEMBER	PANEL MEMBER
--------------	--------------	--------------

OTHERS PRESENT		
<input type="checkbox"/> PRISONER (IF ABSENT, WHY?)		
<input type="checkbox"/> ATTORNEY		
<input type="checkbox"/> DEPUTY D.A.	COUNTY OF	
<input type="checkbox"/> OTHERS:		

STATEMENT OF FACTS

THE HEARING PANEL INCORPORATES BY REFERENCE FROM THE DECISION OF THE HEARING HELD

ON _____, PAGES _____ THROUGH _____

THE STATEMENT OF FACT IS

- QUOTED FROM THE BOARD REPORT, DATED _____, PAGE(S) _____
- QUOTED FROM THE PROBATION OFFICER'S REPORT, PAGE(S) _____
- QUOTED FROM THE COURT OPINION, PAGE(S) _____

PAROLE GRANTED - (YES)

CDC: Do not release prisoner before

Governor's review

Do not release until review

PAROLE DENIED - (NO)

Records Use Only

Parole Release Date

YR MO DAY

Attach Prison Calculation Sheet

AGREED UNSUITABLE (Attach 1001A Form) FOR: _____ YEAR(S)

HEARING POSTPONED/REASON: _____

PANEL RECOMMENDATIONS AND REQUESTS

The Board Recommends:

No more 115's or 128A's

Stay discipline free

Work to reduce custody level

Learn a trade*

Get self-help* *Continue*

Get therapy*

Earn positive chronos

Get a GED*

Recommend transfer to _____

Other _____

*These programs are recommended if they are offered at your prison and you are eligible/able to participate.

Penal Code 3042 Notices

[X] Sent Date: 8/6/04

Commitment Offense(s)

P209 W/12022.5

KIDNAP FOR ROBBERY W/USE F'ARM

Code(s)

CR17643

Crime(s)

6

Case #(s)

Count #(s)

Date Inmate Came to CDC
11/6/80

Date Life Term Began

Minimum Eligible Parole Date
7/31/94

Initial Hearing

[X] Subsequent (Hearing No.) 7

Date of Last Hearing

CDC Representative

Attorney for Prisoner

Address

D.A. Representative

County

This form and the Board's decision at the end of the hearing is only proposed and NOT FINAL. It will not become final until it is reviewed.

Chair

Susan Fisher

Date

9/24/04

Panel Member

A. Lendino

Date

9/24/04

Panel Member

H. Oberholzer Rvn

Date

9/24/04

JAMES BAKER, FRED

CDC # C22918

PRISON CTF

CALENDAR 9/04

DATE